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No. 87-1901

Supreme Court, U.S.

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**In the Supreme Court of the United States**

OCTOBER TERM, 1988

TRANSAMERICAN NATURAL GAS CORPORATION,  
PETITIONER

v.

UNITED STATES DEPARTMENT OF THE INTERIOR,  
ET AL.

ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS  
IN OPPOSITION

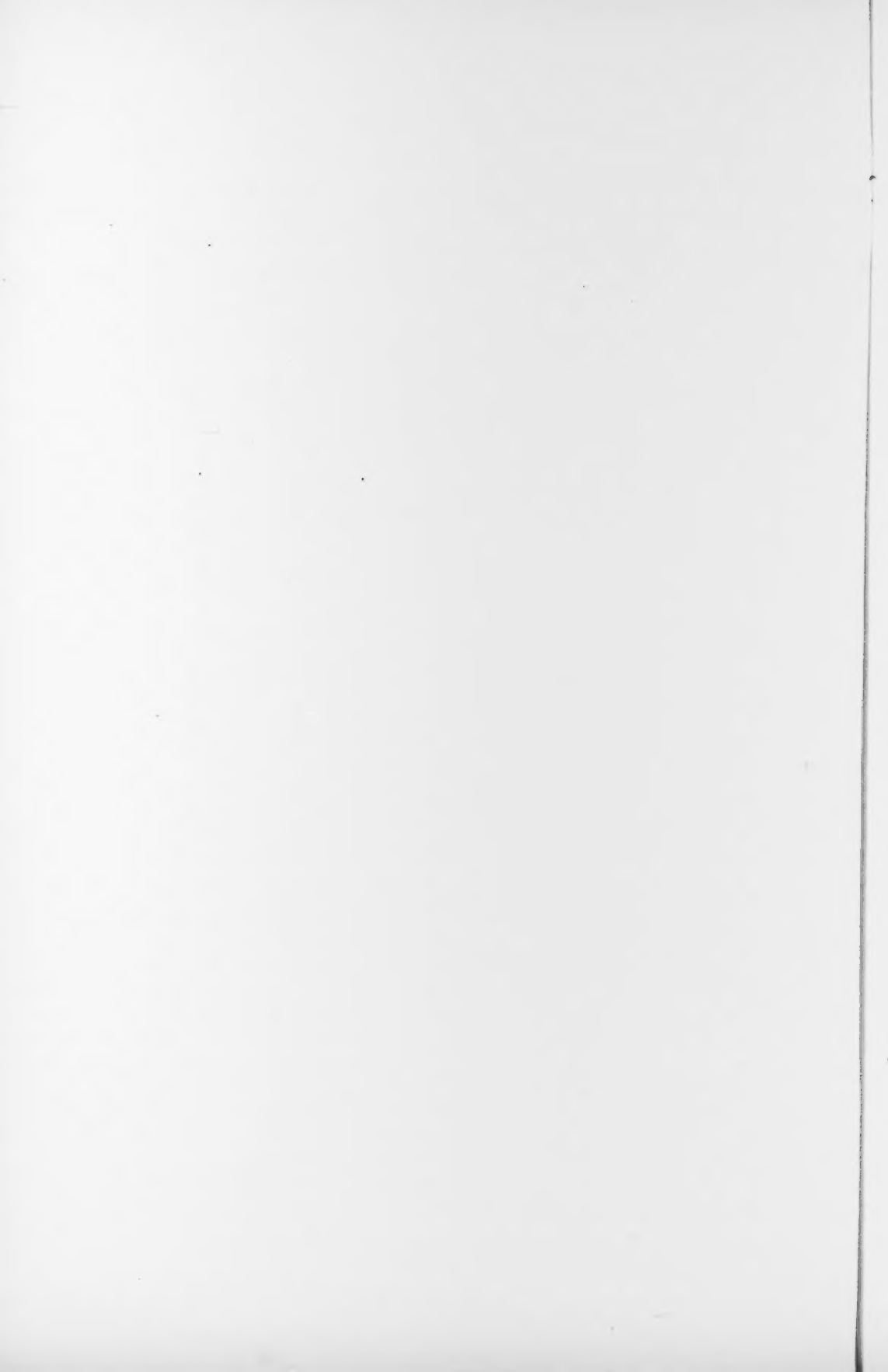
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## **MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION**

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Petitioner contends that the court of appeals erred in dismissing its appeal for lack of jurisdiction because the combined effect of its ruling and the prior adverse decision of the Temporary Emergency Court of Appeals in a parallel appeal from the same district court decision, is to deny any court jurisdiction to consider petitioner's claim that the government overcharged petitioner for oil purchased from the United States.

1. The Department of the Interior grants oil and gas leases on the Outer Continental Shelf under the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. (& Supp. III) 1331 *et seq.* The government retains a royalty interest in these leases, and the Secretary of the Interior is authorized to take royalties in value or in kind (43 U.S.C. 1353). If the Secretary elects to take royalties in kind, the

royalty oil may thereafter be sold to small independent refiners; if the Secretary makes any such sale, he must realize at least the same amount of money that the United States would have obtained if the royalties had originally been taken in cash (43 U.S.C. 1334).

Petitioner is a small refiner of crude oil. In 1973 and 1976, petitioner entered into three contracts with the United States through the United States Geological Survey, a sub-agency of Interior, to purchase crude oil produced from offshore tracts in which Interior had a royalty interest. Pet. App. 5a-6a. Until January 28, 1981, regulations issued by the Department of Energy (DOE) under the Emergency Petroleum Allocation Act of 1973 (EPAA), 15 U.S.C. 754(a)(1), and the Economic Stabilization Act of 1970 (ESA), 12 U.S.C. (1976 ed.) 1904 note, created a complex petroleum pricing structure establishing maximum prices for different categories or "tiers" of crude oil. See, e.g., 39 Fed. Reg. 1924 (1974); 41 Fed. Reg. 4931 (1976). The regulation of petroleum pricing ended on January 28, 1981. Exec. Order No. 12,287, 3 C.F.R. 124 (1982).

Petitioner brought this action against the federal respondents in the United States District Court for the Eastern District of Louisiana seeking a refund under Section 210 of the ESA. Petitioner claimed that it had been sold oil by Interior at a price in excess of the maximum lawful price allowed by DOE's regulations because Interior charged an administrative fee and because petitioner had to pay for transporting the royalty oil to an onshore location. Petitioner also contended that the overcharges constituted an unlawful exaction of money for which it was entitled to restitution, and an unlawful "taking" of property in violation of the Fifth Amendment for which it was entitled to "just compensation." Pet. App. 6a. The

district court dismissed petitioner's complaint for lack of jurisdiction. The court also denied petitioner's motion to transfer its action to the United States Claims Court pursuant to 28 U.S.C. 1631. Pet. App. 7a, 11a.

2. Petitioner filed notices of appeal with both the Temporary Emergency Court of Appeals ("TECA") and the Fifth Circuit. The Fifth Circuit stayed its proceedings pending TECA's disposition of petitioner's appeal (Pet. App. 7a).

a. TECA affirmed the district court's dismissal of petitioner's complaint (Pet. App. 4a-13a). Relying on its prior decision in *Lunday-Thagard Co. v. United States Dep't of Interior*, 773 F.2d 322 (1985), cert. denied, 474 U.S. 1055 (1986), TECA reaffirmed its view that the ESA and the EPAA do not waive the federal government's sovereign immunity (Pet. App. 8a-9a). The court further held that the Tucker Act's waiver of sovereign immunity does not apply to petitioner's claims (*ibid.*). (See 28 U.S.C. 1491.)

TECA also rejected petitioner's alternative contention that its takings and transportation payment claims should be transferred to the Claims Court as "non-EPAA" claims (Pet. App. 9a-12a). The court concluded that petitioner's "supposed 'takings' claim presents solely a statutory claim for overcharges," and that petitioner's "own explanation for its transportation payments claim conclusively demonstrates that it is grounded in the ESA and EPAA" (Pet. App. 11a-12a (footnotes omitted)). The court noted that the Claims Court had recently held that it lacked jurisdiction over cases that were in fact grounded in the ESA and the EPAA, because of the exclusive grant of jurisdiction to the district courts in Section 211 of the ESA (see Pet. App. 10a, citing *Tipperary Refining Co. v. United States*, 11 Cl. Ct. 572 (1987), *aff'd*, 833 F.2d 301 (Fed. Cir. 1987), cert. denied, No. 87-1359 (May 16, 1988)).



b. Following this Court's denial on October 5, 1987, of petitioner's petition (No. 86-1712) for a writ of certiorari to TECA, the Fifth Circuit issued a brief per curiam opinion dismissing petitioner's appeal for lack of jurisdiction. Citing TECA's decision, the Fifth Circuit found that exclusive jurisdiction over the appeal lay with that court (Pet. App. 1a). On June 13, 1988, this Court denied petitioner's motion for leave to file a petition for rehearing of the Court's previous denial of the petition for a writ of certiorari to TECA.

3. The present petition is, in effect, petitioner's third attempt to obtain further review of TECA's decision upholding both the district court's dismissal of petitioner's claim against the United States on sovereign immunity grounds and the district court's refusal to transfer the case to the Claims Court. The Court denied review on the two prior occasions and should do so again now.

Petitioner does not seriously dispute (nor could it) that the Fifth Circuit correctly dismissed its appeal on the ground that Section 211(b)(2) of the ESA vests with TECA "exclusive jurisdiction of all appeals from the district courts of the United States in cases and controversies arising under this title or under regulations or orders issued thereunder" (see Pet. 10-11). Petitioner instead argues that "review is merited because the Fifth Circuit's decision cannot be viewed in isolation" and focuses its attack on the merits of TECA's earlier decision (see *id.* at 11, 12-13).<sup>1</sup>

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<sup>1</sup> Contrary to petitioner's claim (Pet. 11), no "issue of far-reaching public importance" is presented by this case. As petitioner concedes (*ibid.*), "[t]he Fifth Circuit's judgment . . . is limited to an issue of jurisdiction, and an admittedly specialized jurisdiction." Because, moreover, the regulation of petroleum pricing ended on January 28, 1981, the relevant jurisdictional provisions concern only cases under now-expired price control regulations.



Hence, petitioner seeks, in effect, a third opportunity to obtain this Court's review of TECA's ruling, after having twice before been denied such review in the same case. Because petitioner has not presented any arguments that were not presented in either its earlier petition for a writ of certiorari or its more recent petition for rehearing of the Court's denial of that petition, this petition, like the earlier ones, should be denied (see 86-1712 U.S. Br. in Opp.).<sup>2</sup>

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED  
*Solicitor General*

JULY 1988

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<sup>2</sup> Moreover, this Court recently denied a petition for a writ of certiorari seeking review of the Federal Circuit's ruling in *Tipperary Refining Co. v. United States*, *supra*, which held, as TECA had, that the Claims Court lacks jurisdiction over claims, such as petitioner's, arising under oil price control regulations. See *Tipperary Refining Co. v. United States*, 833 F.2d 301 (1987), cert. denied, No. 87-1359 (May 16, 1988).